

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

WARD ARNOLD . C.A. NO. G-13-101  
ANDREA ARNOLD . HOUSTON, TEXAS  
VS. .  
FEDERAL NATIONAL MORTGAGE . JUNE 6, 2013  
ASSOCIATION, et al . 10:10 A.M. to 11:34 A.M.

TRANSCRIPT of HEARING  
BEFORE THE HONORABLE LYNN N. HUGHES  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MR. JEFFREY S. KELLY  
The Kelly Legal Group, PLLC  
101 Westlake Drive  
Suite 300  
Austin, Texas 78768-2125

FOR DEFENDANT FEDERAL NATIONAL  
MORTGAGE ASSOCIATION, BANK of  
AMERICA, N.A.: MR. RAYMOND A. CHENAULT  
McGlinchey Stafford  
1001 McKinney Street  
Suite 1500  
Houston, Texas 77002

OFFICIAL COURT REPORTER: MS. KATHY L. METZGER  
U.S. Courthouse  
515 Rusk  
Room 8004  
Houston, Texas 77002  
713-250-5208

Proceedings recorded by mechanical stenography, transcript  
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## P R O C E E D I N G S

*THE COURT:* Thank you. Please be seated.

Mr. Kelly, when can the Arnolds be out of Fannie Mae's house?

*MR. KELLY:* Your Honor, I'm not able to answer that question, because I am of the opinion that we have a summary judgment and a voluntary --

*THE COURT:* Counsel, you filed a meretricious response to the summary judgment. You have amended the complaint without leave of Court. And you have filed a document that says that the Arnolds and you don't think they have a case, and you would like to nonsuit it. I'll nonsuit it, but it will be with prejudice, because we're too far for you to cut and run and refile it in Dallas or some place.

You cannot -- first of all, your response to the summary judgment, and we can go over it in detail if you would like, but it is simply an empty collection of phrases. It does not respond to the question. For instance, you assert that the defendants don't have title. That will be some surprise to Jerry Fisher, Constable of Precinct 8 of Galveston County, that he's been sued for not having title to any of the interest in this property.

*MR. KELLY:* Well, Your Honor, I think --

*THE COURT:* I don't think Constable Fisher has ever claimed to have an interest in this property, has he?

1           *MR. KELLY:* I'm not aware that he's claimed that he  
2 has --

3           *THE COURT:* And yet you lumped him in with everybody  
4 else.

5           *MR. KELLY:* I didn't, Your Honor. Actually that was  
6 previous counsel that filed that.

7           *THE COURT:* What?

8           *MR. KELLY:* Well, Mr. Fisher was nonsuited early on,  
9 because of his actions, my clients felt as though he acted  
10 wrongfully. But rather than --

11          *THE COURT:* Excuse me?

12          *MR. KELLY:* Pardon me?

13          *THE COURT:* Who thought Mr. Fisher did anything wrong?

14          *MR. KELLY:* My clients.

15          *THE COURT:* And what was that?

16          *MR. KELLY:* What Mr. Fisher did wrong?

17          *THE COURT:* Yes, sir.

18          *MR. KELLY:* Was basically what they believe is that he  
19 acted on the writ of possession without proper authority to do  
20 so.

21          *THE COURT:* And what authority did Constable Fisher  
22 not have to execute a writ, that writ?

23          *MR. KELLY:* Well, if --

24          *THE COURT:* Come on.

25          *MR. KELLY:* Well, Your Honor, I would like to discuss

1 that. If we back all the way up to the actual deed of trust --

2           *THE COURT:* Counsel, Constable Fisher received from  
3 the Court a writ; is that right?

4           *MR. KELLY:* That's correct.

5           *THE COURT:* What authority did Constable Fisher not  
6 have? Your client's belief the writ was improvidently granted  
7 is not Constable Fisher's problem. He didn't petition the  
8 Court. He didn't decide the case. He didn't even write out  
9 the writ. What authority was Constable Fisher devoid of?

10          *MR. KELLY:* Your Honor, I can't answer that question.

11          *THE COURT:* Yes, you can.

12          *MR. KELLY:* No, I can't answer that question.

13          *THE COURT:* It was a malicious empty joinder of  
14 everybody.

15          *MR. KELLY:* No, it wasn't.

16          *THE COURT:* The only thing he could have been included  
17 for was to enjoin him from executing the writ during the  
18 pendency of the suit.

19          *MR. KELLY:* He was a necessary party for that, that's  
20 correct.

21          *THE COURT:* That's not what you said. And it  
22 repeatedly just lumps him in with defendants. Didn't have --  
23 in your answer to the summary judgment, the defendants, and all  
24 of them don't need that, but since there was no justification  
25 for enjoining the execution of the writ, none of the rest of

1 this matters.

2           *MR. KELLY:* Well, Your Honor, we believe that there  
3 was --

4           *THE COURT:* No, you don't.

5           *MR. KELLY:* Yes, sir.

6           *THE COURT:* You imagine.

7           *MR. KELLY:* No, I did not imagine. We have facts.  
8 Mr. Olson, Mr. Jeff Olson did an audit on this loan.

9           *THE COURT:* Pardon?

10           *MR. KELLY:* Mr. Jeff Olson out of Chicago did an audit  
11 on this loan. We have good cause to believe that there are --

12           *THE COURT:* You don't.

13           *MR. KELLY:* Your Honor, we do. And that's from --

14           *THE COURT:* Counsel, you have filed a pleading saying  
15 you don't have cause.

16           *MR. KELLY:* Because the only reason we filed that  
17 pleading yesterday --

18           *THE COURT:* I don't care why you filed it. You have  
19 made a judicial admission, you don't have good cause.

20           *MR. KELLY:* Your Honor, the reason we filed that  
21 pleading yesterday is because for fear of sanctions. My client  
22 didn't want to be subject to sanctions for something that they  
23 didn't even have notice to. Therefore, we decided to  
24 nonsuit --

25           *THE COURT:* Didn't have notice to, what does that

1 mean? There are sanctions that they didn't have notice to?

2           *MR. KELLY:* Correct, Your Honor. Your last order said  
3 that we are to appear today with regard to answering the  
4 summary -- arguing the summary judgment. Secondly, and for, I  
5 believe you said, assessment of sanctions. We don't have any  
6 idea why my clients would be subject to sanctions.

7           *THE COURT:* Yes, you do. And besides, wait a minute,  
8 they did have notice. And since you got that order, you have  
9 made no effort, there's not a pleading to say would the Court  
10 please specify the sanctionable conduct, have you?

11           *MR. KELLY:* I didn't realize that we were responsible  
12 for doing that.

13           *THE COURT:* Well, I'm sorry, I'm not responsible for  
14 what you don't realize. But you cannot -- let's assume that  
15 they did file this.

16           *MR. KELLY:* Which is what, Your Honor, I'm sorry?

17           *THE COURT:* This is the confession of a no merit to  
18 the lawsuit. Because one of them had been diagnosed with  
19 cancer. One might want to abandon the lawsuit for that. But  
20 it says and parties and their counsel are responsible for what  
21 they file. This is a judicial admission and --

22           *MR. KELLY:* Your Honor, when we visited in chambers,  
23 you --

24           *THE COURT:* Wait, wait. In this amended petition, you  
25 seem to have added a couple of parties. Is that right,

1 Mr. Chenault? This Barrett Daffin?

2 MR. CHENAULT: Yes, Your Honor, that's foreclosure  
3 counsel.

4 THE COURT: And Tommy Bastian?

5 MR. CHENAULT: That's probably the substitute trustee,  
6 but I'm not sure.

7 THE COURT: And then, of course, my favorite  
8 defendant, the Mortgage Registration System. At our earlier  
9 conference, Mr. Kelly -- and so people who are just reading  
10 this part of the record will know, you're the second lawyer,  
11 right?

12 MR. KELLY: That's correct.

13 THE COURT: And why is it that on May 24th, 2013, you  
14 would petition for a temporary restraining order? It's a  
15 little late for that, isn't it? We have you, we have  
16 Mr. Chenault, and you have me. What is the need for temporary  
17 restraint? It would be a preliminary injunction at this stage.  
18 Perhaps you ought to read the rules.

19 MR. KELLY: I'm very familiar with the rules, Your  
20 Honor. It would be a temporary injunction.

21 THE COURT: I don't believe that. What the order said  
22 is if the Arnolds -- that there was an offer by Constable  
23 Fisher and the other defendants to give them 30 days to get off  
24 of Fannie Mae's property. And the second paragraph says if  
25 they didn't do it by 4:00 p.m., April 23rd and if they

1 continued to pursue their claims and lose, they will likely pay  
2 for the bank's cost in defending the lawsuit against them. The  
3 order said it. So that was signed April 22nd, which gave them  
4 until May 23rd. And then the hearing reference says potential  
5 imposition of sanctions.

6 Why did you amend without permission?

7 *MR. KELLY:* As we discussed in the conference, we felt  
8 as though the original petition that was removed from state  
9 court was deficient. We discussed that. You and I discussed  
10 in great detail the additional causes of action that we felt  
11 from Mr. Olson's report that were viable causes of action that  
12 we had grounds to do. We did so in the amended complaint. I  
13 did fail to get the Court's permission or opposing counsel's  
14 permission.

15 *THE COURT:* The question was not that you have paid  
16 for a delusional report. But why did you just violate the  
17 rule?

18 *MR. KELLY:* I guess I'm confused about the question.  
19 You started by saying that we filed -- we paid for a delusional  
20 report.

21 *THE COURT:* You filed without leave. That violates  
22 the rules.

23 *MR. KELLY:* And that I apologize for, Your Honor.

24 *THE COURT:* Well, I don't want you to apologize. I  
25 want you to follow the rules.



1           *MR. KELLY:* Your Honor, the only reason we did that is  
2 because of the amount of time. We didn't have enough time  
3 between -- because the conference was set.

4           *THE COURT:* I'm sorry.

5           *MR. KELLY:* So, we were at the conference and it was  
6 just about a week that --

7           *THE COURT:* I'm sorry.

8           *MR. KELLY:* But, Your Honor, I apologize. I apologize  
9 for --

10          *THE COURT:* You didn't have time. You had time.

11          *MR. KELLY:* To motion the Court? To motion the Court  
12 to get permission to amend the complaint?

13          *THE COURT:* It's called to move --

14          *MR. KELLY:* I apologize.

15          *THE COURT:* -- for a continuance or for permission.  
16 Either of those can be done immediately, can't they?

17          *MR. KELLY:* You can file or move, yes, but by the time  
18 you get the decision, today's hearing is upon us, so.

19          *THE COURT:* It could be. It might not be. So, first  
20 you're complaining about how swift and just the Court is and  
21 then you say but all of a sudden I might turn slothful and not  
22 get to it on time.

23          *MR. KELLY:* No, Your Honor, I haven't said that.

24          *THE COURT:* Well, that was the implication, that you  
25 would move for a continuance and I would never see it in time.

1 That's not been a problem.

2           *MR. KELLY:* I did not mean that to be the implication  
3 at all.

4           *THE COURT:* Well, I don't care. Have you favored  
5 Mr. Chenault with a copy of Olson's -- is that this person's  
6 report?

7           *MR. KELLY:* Jeffrey Olson out of Chicago.

8           *THE COURT:* Have you favored him with a copy?

9           *MR. KELLY:* No, I've not.

10          *THE COURT:* Why not?

11          *MR. KELLY:* Because I just got the copy last week.

12          *THE COURT:* The mail worked all week.

13          *MR. KELLY:* Except for Monday, I believe, yes.

14          *THE COURT:* Then FedEx it to him or any other reliable  
15 system. I'm not necessarily advertising for Federal Express.  
16 You knew it was something you were relying on and the rule says  
17 that you're supposed to give that to the other side, doesn't  
18 it?

19          *MR. KELLY:* Your Honor, that would be fully disclosed  
20 in discovery. He would also be named as an expert.

21          *THE COURT:* Counsel, counsel, counsel, it's the  
22 predicate for your amended complaint and you owe him a duty of  
23 full disclosure.

24          *MR. KELLY:* Which I will give him anything he needs.  
25 He's --

1           *THE COURT:* No, you'll give it to him without his  
2 asking. Counsel, this is not a game.

3           *MR. KELLY:* Your Honor, I don't believe it to be a  
4 game. I think it's a very serious --

5           *THE COURT:* Rule 26 says that you're to disclose, not  
6 sit in Austin and wait for it to be asked for. Doesn't it?

7           *MR. KELLY:* Along with a number -- a multiple of other  
8 items, yes, it does.

9           *THE COURT:* And what disclosures have you made to the  
10 defendants since you've been counsel?

11           *MR. KELLY:* No disclosures, Your Honor.

12           *THE COURT:* Yet another violation of the rule. Do you  
13 have copies of Olson's report there with you?

14           *MR. KELLY:* I don't, but I have it and I could e-mail  
15 it to him or burn it to a CD.

16           *THE COURT:* You don't have one there?

17           *MR. KELLY:* I don't, Your Honor.

18           *THE COURT:* How much did you pay for it?

19           *MR. KELLY:* I didn't pay for it, Your Honor. The  
20 Arnolds paid for it.

21           *THE COURT:* Who did?

22           *MR. KELLY:* The Arnolds, my client.

23           *THE COURT:* Well, how much did the -- boy, that's a  
24 distinction.

25           *MR. KELLY:* Well, I'm sorry, Your Honor. It's very

1 important that I answer all of your questions honestly and  
2 specifically.

3 *THE COURT:* It is.

4 *MR. KELLY:* You asked me how much I paid for it. I  
5 did not pay for it.

6 *THE COURT:* Well, the full answer is, "The Arnolds  
7 paid for it, sir."

8 *MR. KELLY:* Out of respect for the Court, I want to  
9 answer all of your questions specifically.

10 *THE COURT:* Well, you didn't.

11 *MR. KELLY:* I'm sorry.

12 *THE COURT:* If you're going by that truth, whole  
13 truth, and nothing but the truth, you missed on the whole  
14 truth. It's like when Mr. Chenault's client BAC Home Loan  
15 Servicing, L.P., gets sued and they say in their -- that  
16 they're incorporated in Nevada and his answer says, "Denied."  
17 And it should say "not Nevada, Minnesota." That's the whole  
18 truth. That's the answer.

19 The rule says you should admit them, deny them,  
20 or say you can't. It doesn't say you have to only use those  
21 three phrases. And Mr. Chenault would not do that.

22 How much did the Arnolds pay?

23 *MR. KELLY:* I believe -- again, this is -- I don't  
24 know for sure, but I believe it was \$1200.

25 *THE COURT:* And when did the Arnolds get the report?

1           MR. KELLY: I have no idea when they got the report.  
2 I received it last week. I had a very long conversation with  
3 Mr. Olson. He went through the specifics.

4           THE COURT: Well, wait. The question is: When did  
5 the Arnolds get the report?

6           MR. KELLY: I don't know.

7           THE COURT: Because you are the Arnolds. It's their  
8 case. If the Arnolds don't give you receipts and letters and  
9 things that they may have, it's their problem. So, we have  
10 what you believe is a critical expert's report on which you  
11 relied to unlicensedly amend the complaint, but you haven't --  
12 you got it last week. You talked to Mr. Arnold. You haven't  
13 furnished it to --

14          MR. KELLY: Mr. Olson. I spoke with Mr. Olson.

15          THE COURT: Yes, Mr. Olson. The litigation that you  
16 mention in Paragraph 18 of this complaint, *Dallas County versus*  
17 *MERSCORP, Inc.*, has nothing to do with chains of title. It has  
18 to do with an equally idiotic lawsuit by nearly every county in  
19 Texas against MERS because it's conceived of avoiding paying  
20 filing fees. It has nothing to do with chains of title. It  
21 had nothing to do with chains of title. Have you read the  
22 complaint?

23          MR. KELLY: I have actually read the complaint, Your  
24 Honor, yes, I have.

25          THE COURT: It's all about some lawyer's

1 misinterpretation of that statutory section about having to  
2 record changes.

3           *MR. KELLY:* Misinterpretation of the property code  
4 statute -- or, I'm sorry, the local government code statute. I  
5 think it's very black and white.

6           *THE COURT:* I don't care what you think, counsel. I  
7 have read it. And it doesn't say -- you're ignorance is  
8 versatile. It says if you're going to change something that's  
9 of record, you must file the document in the county where the  
10 original was filed. You cannot file a release of a deed of  
11 trust in Harris County by filing the release in Potter County.  
12 That's half of Amarillo -- or all of Amarillo.

13           *MR. KELLY:* Actually it says any assignments,  
14 terminations, releases, et cetera, et cetera, et cetera.  
15 There's a number of items that anything dealing with real  
16 property has to be recorded.

17           *THE COURT:* It's not -- no. It says if you're going  
18 to record a change, you have to record it where the original  
19 was. There is no obligation, none whatsoever to the validity  
20 of a deed, a release, an assignment, that it be recorded.  
21 You're an idiot if you don't. I actually had a case where a  
22 company paid a million one for a tract of land out of  
23 bankruptcy. It took it two years to record the deed in  
24 which they only did it after they got sued for possession from  
25 somebody who had another piece of litigation somewhere else.

1 But a deed is effective between the parties when it is  
2 delivered.

3 *MR. KELLY:* I agree with that, Your Honor, but it's  
4 not effective as against third parties. It's one of the  
5 biggest arguments we have about the deed of trust.

6 *THE COURT:* Your client is not a third party. They  
7 issued the instrument, the deed of trust.

8 *MR. KELLY:* Your Honor, was this assignment recorded?

9 *THE COURT:* What?

10 *MR. KELLY:* Was this assignment recorded?

11 *THE COURT:* It doesn't matter. Your client is not a  
12 third party.

13 *MR. KELLY:* Could I point the Court's attention to the  
14 A2 exhibit. It's the note. The note doesn't have any  
15 allonges. It's not endorsed or anything. It's not the note  
16 that flowed through. So, that is one of the reasons that in  
17 our response we --

18 *THE COURT:* Counsel, don't shift ground when you can't  
19 respond. Your client is not a third party and has never been a  
20 third party. Your client issued the note and the deed of  
21 trust. The note is negotiable.

22 *MR. KELLY:* That's correct, Your Honor, it is  
23 negotiable.

24 *THE COURT:* And it's negotiable in blank. It's the  
25 holder.

1           *MR. KELLY:* But it's not stamped. We don't know who  
2 the holder is. We have no proof in the record of who the  
3 holder is.

4           *THE COURT:* Wait.

5           *MR. KELLY:* That's one of the biggest --

6           *THE COURT:* Counsel, stop the song and dance.

7           *MR. KELLY:* There's no song and dance, Your Honor.

8           *THE COURT:* Yes, it is.

9           *MR. KELLY:* It's a very serious matter. My client --

10          *THE COURT:* Counsel, when I say stop the song and  
11 dance, say, "yes, sir," or something and don't start a new song  
12 and dance. Your clients have never had two people demand the  
13 same month's payment on their note at the same time, have they?

14          *MR. KELLY:* Your Honor, I'd ask the Court why the  
15 Court believes that to be the case.

16          *THE COURT:* What?

17          *MR. KELLY:* We have no evidence in front of the Court  
18 to do that.

19          *THE COURT:* Counsel, your clients know that of their  
20 own. And if two people have demanded the same payment, if the  
21 National Bank of San Francisco and the Seamen's Trust Company  
22 of Baltimore had both been sending them demand letters at the  
23 same time for the same amount of money, they would have told  
24 you that. And if we don't have evidence, it's because you and  
25 they didn't produce it. That's something uniquely within their



1 knowledge. They don't -- in your amended complaint and in the  
2 original complaint, it's never been claimed that they're  
3 confused because they're subject to conflicting claims. There  
4 are no conflicting claims. And, so, there's not any doubt.

5 All right. Do we have all of the exhibits?

6 *(Judge conferring with law clerk.)*

7 *THE COURT:* Which one is it you like?

8 *MR. KELLY:* Your Honor, it's not so much one that I  
9 like, rather it's important that the Court pay attention to  
10 what I believe to be what's alleged --

11 *THE COURT:* Oh, stop that.

12 *MR. KELLY:* Well, Your Honor, it's a summary judgment.  
13 I can't affirm that this is the note as it exists today.

14 *THE COURT:* All right. Well, tell --

15 *MR. KELLY:* What's marked as A1 to defendants' --

16 *THE COURT:* Counsel, tell me your reasonable belief  
17 for this not being the note. Come on. You have conferred with  
18 your clients. You've been able to check the public records.  
19 You have consulted with Mr. Arnold, now Mr. Olson. And tell me  
20 your reasonable belief for thinking that A1, if I can finally  
21 get to it, is not the note that they issued to the world.

22 *MR. KELLY:* Your Honor, as you're aware, and as the  
23 Court -- I mean, pardon me, as the Court's aware, a note  
24 wouldn't show up in the public record. So, we can't do a  
25 public records search.

1           *THE COURT:* Counsel, I didn't ask you for what you  
2 can't do. I asked you for what note you do know.

3           *MR. KELLY:* That is correct, but the Court also made  
4 an allegation that we've reviewed the public record. We have  
5 reviewed the public record. The note doesn't show up there.  
6 The reason that we believe --

7           *THE COURT:* Counsel, people have -- you can record a  
8 note.

9           *MR. KELLY:* It's very rarely done, Your Honor.

10          *THE COURT:* That's not the point. If you're worried,  
11 you would check.

12          *MR. KELLY:* We did check the public record. There's  
13 no --

14          *THE COURT:* Well, then it's not recorded. That  
15 doesn't mean this is not -- look, I made a simple statement.  
16 You had the opportunity to check the public records, Google,  
17 Twitter, all sources of information. And you have -- and talk  
18 to, of course, the Arnolds.

19          *MR. KELLY:* And Mr. Olson.

20          *THE COURT:* Well, Mr. Olson doesn't know anything.

21          *MR. KELLY:* Well, he's actually done an SEC search and  
22 he's found that this loan as it stands has been transferred  
23 multiple times. The note as it's presented --

24          *THE COURT:* Mr. Kelly, stop that. I know what these  
25 people do, is -- what they do is prepare a long fancy report

1 that verify the notary's commission dates and all kinds of  
2 stuff and then they completely misstate Texas law. And  
3 actually it's the restatement about notes and transfers and  
4 pools and what is the significance of all these things, and  
5 they're just wrong. If you'll read the deed of trust, which I  
6 guarantee you have not done, it says that its benefits inure to  
7 the holder of the note. There's no transfer of the deed of  
8 trust necessary. The transfer of the note carries with it the  
9 vendor's lien and the deed of trust lien.

10 *MR. KELLY:* Your Honor, I've actually read the deed of  
11 trust many times. Therein lies our biggest issue. If this is  
12 truly the note, how did we go from Countrywide in this case to  
13 someone now claiming -- you're exactly right, Your Honor. The  
14 deed of trust specifically is an agreement among the parties  
15 that says that, hey -- if I may, just please, please, just let  
16 me --

17 *THE COURT:* I know what it is.

18 *MR. KELLY:* Just please let me make one point.

19 *THE COURT:* You've made a lot of points.

20 *MR. KELLY:* Well, I keep getting interrupted, Your  
21 Honor, and I can't --

22 *THE COURT:* Yes, you do, because your points -- I'm  
23 not obliged to sit here and listen to you repeat what is a cult  
24 of misinformation about notes and deeds of trusts. My question  
25 is: This is the note.

1           *MR. KELLY:* Show me the endorsement, Your Honor, if  
2 this is the note --

3           *THE COURT:* No, I want you to know that this is the  
4 note that the Arnolds issued.

5           *MR. KELLY:* That's not -- that is not what my  
6 statement was. If the defendants are coming forth and saying  
7 this is the note as it stands --

8           *THE COURT:* Counsel, is A1 the note that the Arnolds  
9 issued to the world?

10          *MR. KELLY:* I believe it to be a copy of the original  
11 note that was signed, yes.

12          *THE COURT:* Okay. And at about a third of the way up  
13 from the bottom of page 3, what's that?

14          *MR. KELLY:* It's an endorsement in blank. So, we have  
15 no idea who holds this note.

16          *THE COURT:* Ignorance is not a defense.

17          *MR. KELLY:* I'm not --

18          *THE COURT:* Ignorance -- that wasn't the question.  
19 Ignorance is not a defense.

20          *MR. KELLY:* Correct. And that's the one of the  
21 reasons why we're asking the defendants to prove who holds the  
22 note.

23          *THE COURT:* No.

24          *MR. KELLY:* If they're trying to --

25          *THE COURT:* Wait. Wait. I'm going to do this on the

1 papers, if you will not limit yourself to the point under  
2 discussion briefly and not simply repeat your slogans. Now,  
3 are you going to act like a lawyer or are you going to act like  
4 a used car salesman?

5 *MR. KELLY:* It's my belief that I'm acting as a very  
6 good lawyer, Judge, this morning.

7 *THE COURT:* You're wrong. You're trying to obscure  
8 things and waste everybody's time.

9 *MR. KELLY:* I'm not trying to waste anyone's time,  
10 Your Honor. I'm just trying to --

11 *THE COURT:* Well, you're doing and awfully good job of  
12 it.

13 *MR. KELLY:* I'm just trying to advocate the best I can  
14 for my client.

15 *THE COURT:* Based on a reasonable investigation of the  
16 facts and the law.

17 *MR. KELLY:* That's correct.

18 *THE COURT:* Now, tell me what Mr. Olson knows about  
19 Texas law.

20 *MR. KELLY:* I can't speak to what our expert is --

21 *THE COURT:* Stop. That's all I want to know. You  
22 have no idea. And what is his other background that makes him  
23 qualified to be an expert?

24 *MR. KELLY:* He's been doing this for many, many years.  
25 He's very familiar with the UCC and very familiar with the SEC

1 requirements, that these notes are specifically traced through  
2 the system.

3 *THE COURT:* What, the SEC?

4 *MR. KELLY:* Securities and Exchange Commission.

5 *THE COURT:* I just wanted to make sure you're talking  
6 about the wrong entity. All right. The Securities and  
7 Exchange Commission has the ability to tell people how they may  
8 publicly market securities. It says nothing about the validity  
9 of a note or a transfer.

10 *MR. KELLY:* Well, the pooling and servicing agreements  
11 from the defendants are recorded in the SEC as public record.

12 *THE COURT:* Yes, because there's some interest in the  
13 pool on the open market. That's the SEC's jurisdiction. And  
14 your guy has apparently read the pooling agreement. And if  
15 he's no different from the rest -- well, if he makes the claim  
16 that the pooling agreement has any effect at all, he hasn't  
17 read it carefully.

18 Now, we have a note endorsed in blank. So,  
19 there's nothing wrong with the note, is there?

20 *MR. KELLY:* I don't know how to answer that question,  
21 because if I answer it the way I want to answer it, I believe  
22 the Court will think I'm playing games. I don't know if  
23 there's anything wrong with this note. The reason that we're  
24 making an issue --

25 *THE COURT:* Counsel, you're making up facts that you

1 hope exist. One of the defendants has produced this note and  
2 on its face it appears regular and you have no document to the  
3 contrary to offer in response to the summary judgment that  
4 would question the validity of this note.

5 *MR. KELLY:* We have not objected to this as evidence,  
6 that's correct.

7 *THE COURT:* So, this is it.

8 *MR. KELLY:* But the fact that's in dispute today is  
9 who holds this note. It's endorsed in blank.

10 *THE COURT:* Okay. I know it's endorsed. See, you  
11 repeat the obvious. As I pointed out, it was endorsed in blank  
12 to make sure I had you committed to that, because you were  
13 muttering things about allonges missing and things. So, the  
14 question that bothers you is you don't know who holds it.  
15 Right?

16 *MR. KELLY:* That's correct.

17 *THE COURT:* Okay. And, Mr. Chenault, I've got to give  
18 you something to do. Well, he's not going to talk for long.  
19 He never does. When was the last time the Arnolds paid an  
20 installment on the mortgage? I know it's all in there, but I  
21 just -- well, they defaulted in October 1st of 2011, that's  
22 what I have in my notes.

23 *MR. CHENAULT:* I don't believe they have paid for  
24 approximately 18 months now.

25 *THE COURT:* Pardon?

1           *MR. CHENAULT:* I think it's been about 18 months since  
2 they've made a payment.

3           *THE COURT:* In 18 months -- well, from December of  
4 2005 when the Arnolds issued this note to Countrywide and  
5 Countrywide requested payments; is that correct, Mr. Kelly?

6           *MR. KELLY:* I don't have any other evidence to the  
7 contrary.

8           *THE COURT:* The Arnolds don't know anything to the  
9 contrary. Then the Arnolds quit paying Countrywide in October  
10 of 2011. And sometime around February or March of 2012, the  
11 Arnolds started getting demands and letters and other strange  
12 correspondence from computers at Bank of America. Is that  
13 about right?

14                   And did Mr. Olson or you read the papers in '11  
15 and '12 or go online or go to the SEC or the FDIC or the -- I  
16 don't even know what they call the office of thrift  
17 supervision, on any of those institutional Web sites or just  
18 Google Countrywide, Bank of America?

19           *MR. KELLY:* During that time when they were receiving  
20 those letters?

21           *THE COURT:* Any time.

22           *MR. KELLY:* I'm quite sure my clients did during those  
23 times and, yes --

24           *THE COURT:* Well, what about you? Recently?

25           *MR. KELLY:* Yes.



1           *THE COURT:* Mr. Olson?

2           *MR. KELLY:* Again, I can't speak to what he's done as  
3 an expert.

4           *THE COURT:* Well, is it in his report?

5           *MR. KELLY:* References to specific letters?

6           *THE COURT:* No. References to anything that might  
7 have happened with Countrywide and Bank of America in that  
8 time.

9           *MR. KELLY:* Yes.

10          *THE COURT:* And what was that?

11          *MR. KELLY:* Well, I believe, to be fairly common  
12 knowledge, that Countrywide basically went under. Bank of  
13 America bought the assets, meaning the notes.

14          *THE COURT:* Well, I don't know that it was an asset  
15 purchase or a stock purchase.

16          *MR. CHENAULT:* It was an acquisition.

17          *THE COURT:* The whole company?

18          *MR. CHENAULT:* The whole company.

19          *THE COURT:* Whole company. And then here we are with  
20 Bank of America demanding payment, right?

21          *MR. KELLY:* Correct.

22          *THE COURT:* So, Countrywide is still demanding  
23 payment. How can you be confused about the holder when the  
24 Arnolds issued a note to Countrywide and Countrywide changed  
25 its name to Bank of America and Bank of America asked for

1 payments and asked and asked? At no point did the Arnolds  
2 write Bank of America and say, "We're confused. We're getting  
3 demands from Countrywide and you," although with some of Bank  
4 of America's paperwork, that could have happened. But they  
5 haven't told you that they're -- the Gambino family in New York  
6 and Bank of America are both demanding payments on the loan,  
7 have they?

8 *MR. KELLY:* They have not told me that.

9 *THE COURT:* And the person who makes the demand here  
10 and the person who foreclosed and all those things is the very  
11 same person that lent the Arnolds the money?

12 *MR. KELLY:* (Shaking head.)

13 *THE COURT:* Why are you shaking your head?

14 *MR. KELLY:* That's not the case. Countrywide lent the  
15 money. Countrywide was the payee of the note.

16 *THE COURT:* Countrywide is Bank of America.

17 *MR. KELLY:* Then why doesn't Bank of America -- excuse  
18 me. I'll retract that statement.

19 *THE COURT:* I just spent seven or eight minutes going  
20 through the fact that the reason there's nothing else on the  
21 note and the reason that there's no confusion on the Arnolds'  
22 part is the note hadn't gone anywhere. Countrywide just  
23 changed its name. And what was Mr. Arnold's education?

24 *MR. KELLY:* He's a real estate -- I don't know his  
25 full --

1           *THE COURT:* He's a real estate broker.

2           *MR. KELLY:* Yeah.

3           *THE COURT:* So, he probably knows about problems in  
4 Countrywide mortgages. And, also, it's -- the loan was bought  
5 for \$230,000 and the appraisal currently is 300,000. So, we're  
6 not talking about a migrant farmworker from Belgium who is  
7 being oppressed and living in a shack out on the bypass, are  
8 we?

9           *MR. KELLY:* We're not.

10          *THE COURT:* So, since the holder is the original  
11 payee, there can't be any argument about all this other stuff.  
12 There's no confusion. There's no who holds the note.  
13 Mr. Olson has told you a lot of things about mortgage pools and  
14 MERS and stuff. MERS is a tracking system that's for the  
15 efficiency of transferring mortgages. They would have their  
16 own index numbers and that lowers the cost of mortgage lending,  
17 which lowers the cost of mortgages to consumers and it's a  
18 wonderful thing. It doesn't do anything except sort of keep  
19 track.

20          *MR. KELLY:* Correct. But in this case they tried to  
21 assign the deed of trust. They can't do that. They're only a  
22 registration agency. They've admitted that in the bankruptcy  
23 transcripts. They are not -- they are not and they do not have  
24 the ability to transfer the deed of trust. That's what they've  
25 done here.

1           *THE COURT:* No.

2           *MR. KELLY:* Yes.

3           *THE COURT:* If they did, they transferred something to  
4 which they didn't have title. So, it's ineffectual anyway.

5           *MR. CHENAULT:* Yes, Your Honor. I believe the deed of  
6 trust contains some provisions where --

7           *THE COURT REPORTER:* Can he speak into the mike?

8           *THE COURT:* Speak up or talk into the microphone.

9           *MR. CHENAULT:* I'm sorry. I believe the deed of trust  
10 that the Arnolds executed contains a provision that identifies  
11 MERS as the beneficiary and gives them -- acknowledges that  
12 MERS has the right to transfer, assign, or even foreclose.

13           *MR. KELLY:* Being well-versed in reading a deed of  
14 trust very many times, I can say that in the first paragraph,  
15 it recites them as the nominee, but then MERS is now trying to  
16 assign the deed of trust. They can't do that. They're only a  
17 tracking system. They don't hold title to or the ability to  
18 transfer the deed of trust.

19           *THE COURT:* Well, I mean, you can sell your car to  
20 MERS if you want to.

21           *MR. KELLY:* Pardon me, Your Honor?

22           *THE COURT:* You can sell your car to MERS. They can  
23 take title to stuff.

24           *MR. KELLY:* It can't. It's only a registration  
25 system. It's been --

1           *THE COURT:* It buys computers. It hires people. It  
2 has desks. I bet you it has company cars. What do you think?

3           *MR. KELLY:* Your Honor, I can't answer that question,  
4 but it's been very well --

5           *THE COURT:* Think.

6           *MR. KELLY:* I can't say that they have company cars.  
7 I know they have computers because they spit these assignments  
8 out. They can --

9           *THE COURT:* Well, they may only have a computer  
10 service.

11          *MR. KELLY:* That's true.

12          *THE COURT:* Make them a good deal and see if they'll  
13 buy you a car. Why didn't Ms. Arnold join into all of --

14          *MR. KELLY:* Pardon me, Your Honor?

15          *THE COURT:* Well, it's all pro forma by her. She --  
16 he signed the note. She didn't. And then all the security is  
17 pro forma -- I mean, I know technically why they insisted she  
18 do that is so she didn't claim any homestead interest in it and  
19 that sort of thing. But why didn't she jump in there and  
20 participate in the note, too?

21          *MR. KELLY:* I don't know. It could be for credit  
22 reasons. It could be for a number of issues.

23          *THE COURT:* Well, what the deed of trust clearly  
24 says -- that you've read carefully, right? That's what you  
25 told me earlier.

1           *MR. KELLY:* Right.

2           *THE COURT:* Okay. Well, all the way on page 2, it  
3 says MERS is an agent of the holder.

4           *MR. KELLY:* And Paragraph E of the --

5           *THE COURT:* I know where it is. I just read it from  
6 there.

7           *MR. KELLY:* I'm sorry. I apologize.

8           *THE COURT:* It's an agent. It's a flunky. The holder  
9 is the organ grinder. MERS is the monkey.

10          *MR. KELLY:* Correct. Paragraph E says that it's the  
11 nominee to the lender.

12          *THE COURT:* They've got the authority to do whatever  
13 the holder tells them to do in that situation. Whether the  
14 agent of the lender is MERS or a deputy vice president in the  
15 Minot, South Dakota branch of Bank of America, but Bank of  
16 America works through agents.

17          *MR. KELLY:* In this case MERS, I believe, alleges that  
18 they were acting as an agent for Countrywide.

19          *THE COURT:* But Countrywide is Bank of America. Stop  
20 that.

21          *MR. KELLY:* Yes, sir.

22          *THE COURT:* Your arguments are not circular. They're  
23 spiral and spiral downwards. You keep coming back to the same  
24 thing after we've exhaustively discussed it.

25                 The deed of trust lien was foreclosed by the

1 trustee at the request of the initial payee of the note. By  
2 your clients' logic, if you issued a note to Mildred Johnson  
3 and she marries Ralph Ferguson, that she can't hold the note  
4 anymore. She doesn't have to endorse it to herself. Does she?  
5 Besides it's already endorsed in blank, so it doesn't matter  
6 who, but it happens to be endorsed in blank and still held by  
7 the original payee.

8                   And in your proposed amended petition, Mr. Kelly,  
9 you actually name Bank of America as successor by merger to  
10 Countrywide with the payee named the party, clearing up a whole  
11 lot of confusion for us.

12               *MR. KELLY:* The only reason we named it that way is  
13 because that's the way it's been presented.

14               *THE COURT:* I don't care why you did it. You sued  
15 them that way.

16               *MR. KELLY:* Well, but it's -- no, it's not a judicial  
17 admission that we say that Bank of America holds the note or  
18 anything. It's just that that's the way that they've  
19 created --

20               *THE COURT:* You have pleaded -- you have pleaded that  
21 Bank of America is the successor by merger to Countrywide.  
22 Countrywide is the payee. Ipso facto, to lapse into Latin as I  
23 like to do every once in a while, Bank of America holds the  
24 note.

25                   If title to the note was transferred to a

1 mortgage pool, the deed of trust would automatically follow  
2 title to the note. Right?

3           *MR. KELLY:* If that's the case, then why was the  
4 assignment done?

5           *THE COURT:* What?

6           *MR. KELLY:* If that's the case, then why was the  
7 assignment done in 2012? If it went into the mortgage --

8           *THE COURT:* You know, if there's belts and suspenders  
9 doesn't mean that they're naked. Just because they overdid  
10 it -- and mainly I suspect they're recording changes simply for  
11 the fact that they're trying to prevent this sort of nonsense,  
12 running up their transaction costs. Now, I don't know how this  
13 mortgage pool, if there was one, worked. But lots of mortgage  
14 pools, what is assigned is the income and not title to the  
15 note. And so that would mean that Bank of America is still the  
16 holder of the note. They've just told their brother-in-law  
17 that you can have the 84 percent of the gross interest income  
18 because they have a contractual commitment to assign the income  
19 stream from enough producing mortgages to keep the mortgage --  
20 the pool balance at a certain level. It's all very clever,  
21 invented by the Dutch in about 1620. It's nothing new. It's  
22 nothing controversial. It's certainly nothing evil and it's  
23 not illegal.

24           All right. The lender does not have a fiduciary  
25 duty to your clients. They're adversaries. The borrower and



1 the lender do not have a fiduciary relationship. If the lender  
2 takes security, they have a bailee's ordinary responsibility  
3 for the care of the security. But that's not a problem here,  
4 because there was a trustee and an instrument signed by your  
5 clients that defined the handling of the security. We have a  
6 very long show me the note provision. The bank does not have  
7 to join Arnold's wife in the eviction. They just have to  
8 assert the title that is antecedent to hers. Well, you say  
9 eviction. They're still in the house, right?

10 *MR. KELLY:* Correct, Your Honor.

11 *THE COURT:* And they haven't paid the taxes or  
12 insurance on the house since October 1 of 2011, right?

13 *MR. KELLY:* When I asked after our conference, when I  
14 asked that, they said that they had not for fear of the  
15 unknown, not knowing how this was going to turn out. They  
16 didn't know what to do with it.

17 *THE COURT:* What?

18 *MR. KELLY:* They had no problems with paying it. They  
19 just didn't know who to pay it to.

20 *THE COURT:* You pay insurance to the insurance  
21 company, and you pay the taxes to whoever sends you the opaque  
22 little bills. Those are current operating costs. Those are  
23 not loan costs. They're not capital costs. They are current  
24 operating costs. Did your clients pay their electrical bill?

25 *MR. KELLY:* I would have to assume that they did.

1           *THE COURT:* Oh, you would. They make the taxing  
2 authorities look lax, and the water bill, not to mention the  
3 cable bill and a bunch of other stuff. So, they didn't even  
4 pay the operating costs but allowed Bank of America to pay them  
5 for them. So, at a minimum the Bank of America would have been  
6 owed all that stuff that it advanced your clients. And there  
7 is an independent obligation in the deed of trust to do both  
8 those things, on your clients, to ensure and to pay the taxes.  
9 Did you read that part?

10           *MR. KELLY:* I did, Your Honor.

11           *THE COURT:* I don't see it. She signed the deed of  
12 trust, didn't she?

13           *MR. CHENAULT:* I believe she did pro forma.

14           *THE COURT:* Well, but she has no independent  
15 interests. She --

16           *MR. CHENAULT:* We would only have recourse against  
17 him, because he's one that signed the note.

18           *THE COURT:* Well, but I can pledge my house to his  
19 house's mortgage, can't I?

20           *MR. CHENAULT:* I wouldn't know if --

21           *THE COURT:* I'm not about to. I just want to make  
22 that clear. But you take collateral security all the time.

23           *MR. CHENAULT:* We do.

24           *THE COURT:* The house is direct security, but people  
25 take all kinds of --

1           *MR. CHENAULT:* Part of the reason for requiring the  
2 signature on the deed of trust is for these kinds of  
3 situations.

4           *THE COURT:* But she subordinated her title to the deed  
5 of trust lien. And is the deed to him?

6           *MR. CHENAULT:* Yes.

7           *THE COURT:* You shouldn't have to -- just move it  
8 closer to you.

9           *MR. CHENAULT:* Yes, the deed is to Ward Arnold I  
10 believe is his first name.

11           *THE COURT:* Okay. So, the loan was foreclosed against  
12 him?

13           *MR. CHENAULT:* Yes.

14           *THE COURT:* But to the extent she has any interest,  
15 she subordinated it to the deed of trust lien?

16           *MR. CHENAULT:* That's correct, Your Honor.

17           *THE COURT:* And, of course, her interests would be  
18 entirely derivative of Ward's in the vendor's lien in the deed  
19 to him.

20           *MR. CHENAULT:* That's right, Your Honor.

21           *THE COURT:* All right. On the date of foreclosure,  
22 December 4th, 2012, the Arnolds had not paid for over a year.  
23 What's wrongful about the foreclosure?

24           *MR. KELLY:* Well, a number of things. The deed of  
25 trust --

1           *THE COURT:* Well, if they all go back to that -- if  
2 they all go back to the -- these arguments about separation and  
3 recordation, we've covered those. But in the foreclosure  
4 itself, what was wrongful?

5           *MR. KELLY:* It's our belief that the errors that  
6 occurred with the deed of trust are as well errors that caused  
7 problems with the deed of trust, we believe.

8           *THE COURT:* I said besides that.

9           *MR. KELLY:* Exactly. So, we briefed those. We'll  
10 stand on our brief. No further comments on that.

11           *THE COURT:* Breach of contract for not recording. The  
12 note is a contract full and itself, whether it is ever recorded  
13 or the benefits of it are sold to somebody else. And  
14 technically it's not a contract. It's a species of a  
15 consensual agreement. It's a grant. It's an unconditional  
16 promise to pay by your client. And, so, contracts don't have  
17 to be recorded. They may, but they don't have to be.  
18 Promissory notes don't have to be recorded. They may be, but  
19 they don't have to be. But failure to record an instrument  
20 issued by your clients is not a breach of anything. They're  
21 not obliged to record it for their benefit. They would only  
22 record it for their own benefit.

23                   And what contract did anybody in this interfere  
24 with tortiously?

25           *MR. KELLY:* For fear of frustrating the Court, I'll

1 stand on our brief as well. Most of these issues were detailed  
2 in our brief and they're --

3           *THE COURT:* In other words, there isn't a contract  
4 that you can identify. There's only -- the note's not a  
5 contract. The deed of trust is not a contract. The deed with  
6 the vendor's lien is not a contract. Your clients' failure to  
7 pay the mortgage is not a contract.

8           *MR. KELLY:* It's our belief that the deed of trust is  
9 a contract. It's a bilateral agreement between the parties.  
10 It requires a trustee doing certain things.

11           *THE COURT:* There's a reason that we have labels for  
12 things. Like I get real property leases that say "lease  
13 agreement contract." And if they're really good draftsmen,  
14 they say "mutual lease agreement contract."

15           *MR. KELLY:* Isn't that redundant?

16           *THE COURT:* It's redundant about six different ways.  
17 A lease is a bilateral consensual agreement, the transfer of  
18 occupancy without title to real property. That's what the word  
19 means. A deed of trust is just what it says. It's a deed,  
20 which like a contract is a commitment in trust and then the  
21 conditions of the trust are in there. It's no different than  
22 an oil and gas lease is actually not a lease. You can call it  
23 that to throw the Iraqi terrorists off. It's a grant with the  
24 mineral fee on a condition subsequent to failure to produce or  
25 keep the half-million-dollar lending fee on the condition of

1 production. Bankruptcy courts in this building treat oil and  
2 gas leases as if they are leases. And they are in Kansas. So,  
3 you've got to be very careful about that.

4 All right. And I took that from the unpermitted  
5 amended complaint. All right. Yes, sir.

6 MR. CHENAULT: If the Court is still considering the  
7 voluntary dismissal even with prejudice --

8 THE COURT: I'm not.

9 MR. CHENAULT: All right.

10 THE COURT: I'm going to enter a judgment with title  
11 and possession.

12 Out of a perhaps perverse curiosity, I would like  
13 to see Mr. Olson's report, but I want him to have one. So,  
14 unless somebody objects to my -- I don't necessarily want to  
15 put it in the record. You can if you want to, but I would like  
16 to just look at it. I've seen 123,496 of them. I just --

17 MR. CHENAULT: I've seen a number of them, too, Your  
18 Honor, and I've yet to see one that didn't have a disclaimer  
19 that it was not an opinion.

20 THE COURT: Oh, usually there's a page, I'm not a  
21 lawyer, not an accountant, not a securities analyst, but I am a  
22 certified securitization analyst. And that could be true.  
23 That part could be true, but that's about the point, since it's  
24 a title they make up, that you leave. Do you go on that  
25 bankruptcy lawyer in Ohio's Web site, a baker's dozen of

1 reasons not to pay your mortgage? And they list all these  
2 things. I hope he makes more money off his Web site than he  
3 does practicing law like that.

4 So, we're back to my original question. When can  
5 they be out?

6 *MR. KELLY:* Can I ask the Court for a month?

7 *MR. CHENAULT:* We would probably be amenable to a  
8 month. Our clients are a little upset that they had to go  
9 through all this briefing.

10 *THE COURT:* Well, I haven't gotten to the sanctions  
11 part.

12 *MR. CHENAULT:* But 30 days would be acceptable.

13 *THE COURT:* All right. Today is the anniversary of  
14 the liberation -- the start of the liberation of Europe.

15 *MR. CHENAULT:* D day.

16 *THE COURT:* More people landed in 24 hours on June 6th  
17 at Normandy than were in the United States Army on  
18 September 1st, 1939, when the war broke out. And there were a  
19 lot of other things going on at the same time, but just that's  
20 one of those facts that puts into perspective how unprepared we  
21 were.

22 Well, 30 days is July 4th. So, we'll move it up  
23 to July 3rd. Now, Mr. Kelly, I do not know the Arnolds, but I  
24 will retain jurisdiction of this until they are gone. And  
25 should they take things from the house to which they do not

1 have title, fixtures, if there's any defacing or to be trendy,  
2 trashing of the house, killing plants, I mean, any of that,  
3 they will answer to me.

4 *MR. KELLY:* I will convey that message to them, Your  
5 Honor.

6 *THE COURT:* Make it perfectly clear. Since the Kellys  
7 have been living in a 300,000-dollar house for a couple of  
8 years, paying no mortgage --

9 *MR. KELLY:* Your Honor, my name is Mr. Kelly.

10 *THE COURT:* I'm sorry. The Arnolds have been living  
11 in a 300,000-dollar house -- you've probably got one of those  
12 Austin mansions. I've read about what goes on in Austin. For  
13 over two years not paying a cent on their mortgage, not paying  
14 taxes or insurance on the house, they certainly have some  
15 disposable income. So, Mr. Chenault, can you estimate a  
16 reasonable fee for having to go through this?

17 *MR. CHENAULT:* I would estimate it at \$7,500.

18 *THE COURT:* Does that sound reasonable, Mr. Kelly?

19 *MR. KELLY:* No, not whatsoever, Your Honor.

20 *THE COURT:* Pardon?

21 *MR. KELLY:* No, not whatsoever, I don't think.

22 *THE COURT:* What is reasonable?

23 *MR. KELLY:* Well, for one, the implications of  
24 sanctions we don't believe are -- is relevant or --

25 *THE COURT:* Excuse me, counsel. I asked you for a



1 quantum that's a reasonable cost for the people who are kind  
2 enough to lend your clients money eight years ago, to have gone  
3 through this last spasm, including addressing the unpermitted  
4 amended complaint and frankly the whole case. But what is a  
5 reasonable fee?

6 *MR. KELLY:* Well, knowing opposing counsel's  
7 expertise, I would say he's probably billing out at 300 an  
8 hour.

9 *MR. CHENAULT:* Approximately.

10 *MR. KELLY:* And giving him the benefit of doubt of ten  
11 hours, I would say that this shouldn't exceed \$3,000.

12 *THE COURT:* And they paid \$1400 for Olson's report.  
13 They paid that much to get the information that presumably was  
14 given to the first lawyer. They were offered a chance then to  
15 stop it after a full explanation at least as long as this, the  
16 first round. When they refused, the lawyer declined to  
17 represent them further. They hired you. They paid Mr. Olson.  
18 I don't know when that happened, but I think it happened early  
19 on, because in real estate circles, they know these things. It  
20 has been protracted since whenever the first thing was filed,  
21 which I've now buried 43 times. Do you know when they first  
22 sued in state court?

23 *MR. KELLY:* It was removed here.

24 *MR. CHENAULT:* I thought it was in --

25 *THE COURT:* I know I've got it -- well, here it is.

1           *MR. CHENAULT:* If it helps the Court, the reason I say  
2 7,500, in this particular instance, we agreed to a defense for  
3 a flat fee of \$7,500. So, it's not just simply total of hours  
4 for this. It's just what it cost our client to defend.

5           *THE COURT:* And there all kinds of hours of actually  
6 reading all of this stuff. Even though they are largely  
7 repetitive, there are wrinkles. But this was filed in  
8 Galveston County with a stamp that apparently the County bought  
9 in 1924, on March 18th. Is that about right?

10           *MR. CHENAULT:* I think so. It's a relatively new  
11 suit. And, frankly, we didn't expect it to be anything,  
12 because we have a plaintiff that was knowledgeable in real  
13 estate and we didn't expect that we would have to litigate it  
14 as vigorously as we have.

15           *THE COURT:* All right. I really appreciate you,  
16 Mr. Chenault, because you either mumble almost as bad as I do  
17 or speak softly, whichever the case is, so the court reporter  
18 won't think I'm the only bad person around.

19           I think \$7,500 in the Houston market for taking  
20 on the responsibility of what is a three or \$400,000 asset,  
21 because if the Arnolds succeeded on any of their claims, like  
22 tortious interference, there are all kinds of soft damages.  
23 Could even be soft damages in a wrongful -- I mean, breach of  
24 fiduciary duty, but not normally. But in the amended complaint  
25 there are eight legal theories. And as misguided as they are,

1 they still require a defense counsel to carefully read them and  
2 to carefully check the facts that might apply to them. So, I  
3 think \$7,500 is reasonable. And you've noticed in your brief  
4 experience with Mr. Chenault, he did not do what some defense  
5 lawyers do, which is make it worse rather than better by filing  
6 a bunch of other stuff. He quietly, too quietly for the  
7 reporter, methodically goes about his business and burdens the  
8 Court, the plaintiffs, and his client as little as possible.  
9 And the fee is joint and several with you and both Arnolds.

10 *MR. KELLY:* I would ask the Court to reconsider that.  
11 I don't know that I was responsible for any of the \$7,500.

12 *THE COURT:* We had a conference. We covered all of  
13 this at the conference, which was the same matter we covered  
14 before. The transcript of that was available. You reinvented  
15 the entire case and required his additional briefing and his  
16 motion for summary judgment to be more extensive than it  
17 otherwise would have been and this was after, of course, there  
18 was an offer that was recommended by earlier counsel to quietly  
19 quit the premises two months ago. But your clients persisted  
20 in their suit, which they couldn't have done without you. Why  
21 shouldn't you pay your share?

22 *MR. KELLY:* There's a substantial amount of case law  
23 that specifically is on point with regard to attorneys and  
24 whether or not they're liable for attorney's fees or damages in  
25 this case when pursuing their client's interests. For

1 instance, Barrett Daffin is at the front -- the forefront of  
2 this and every time there's a motion, they automatically plead  
3 that there's no liability whatsoever. They're in litigation  
4 and -- well, I can provide a brief for the Court, but --

5 *THE COURT:* Wait a minute. What are you talking  
6 about?

7 *MR. KELLY:* Your Honor --

8 *THE COURT:* I'm talking about your actual behavior on  
9 two occasions in person and several occasions in writing, which  
10 pursue claims that had already been fully addressed in an  
11 earlier hearing with an earlier lawyer, and nothing has changed  
12 except the volume of talk and the volume of paper. I even  
13 explained to your clients that this was a likelihood. But  
14 there is no misunderstanding. This is not one of those cases  
15 where the note's been through 43 hands. But despite, I don't  
16 know, seven or 800 of these cases, I've never had a case with  
17 dual demands. Every case I have that people have dealt with  
18 it, they have never raised the question of, gee, you've been  
19 sending me demands and everything for a year. Are you really  
20 the holder of the note? They've never written the lender and  
21 said, "I don't understand." Only after they fall into the  
22 clutches of an Olson or whatever that guy in Ohio's name is,  
23 they spend too much time on Google or they hire a lawyer who  
24 will persist in these claims, do they decide that they were  
25 confused.

1           There is no evidence, none, that your clients  
2 have offered that they were confused. They have claimed  
3 confusion. But there is nothing that they have produced that  
4 would suggest a plausible basis for them having a  
5 misunderstanding about with whom they were dealing and why. A  
6 claim of confusion is not evidence of confusion. But in this  
7 case it's as simple and direct as it could be. Countrywide  
8 lent them \$300,000. It became the Bank of America. And they  
9 didn't pay for two years. They didn't pay anything. And they  
10 haven't saved the money to bring it current.

11           Sometimes I've had people who there's a real  
12 dispute about something and they opened a savings account and  
13 put their -- what they thought the right monthly payment was  
14 into the savings account every month. So when they came to see  
15 me, they said, "Here's what I think I owe," and they want to  
16 explain to me why that's off. Those cases are a consequence of  
17 poor computers, which means poor leadership in the lenders or  
18 holders. There are all kinds. I had a case where the nice  
19 couple, they said they fell behind. They had a contract in  
20 escrow with an earnest money deposit for enough money to pay  
21 off the lender and they got \$30,000 of equity. And once the  
22 lender found that out, the case went away. And they didn't  
23 know what else to do but sue. And that's -- and they did it  
24 themselves actually. And they had facts on their side. Don't  
25 foreclose. We've got a third party sale.

1 I've had other cases where they keep getting  
2 temporary restraining orders based on a sale, all of which are  
3 to somebody whose address they don't know and there's no  
4 earnest money and other things like that.

5 Your clients had zero evidence of anything, other  
6 than for some reason they may have inadvertently fallen behind,  
7 but Countrywide did not adopt your clients. They lent them a  
8 whole bunch of -- a third of a million dollars, roughly, to  
9 enable them to live in a house that they chose. They chose the  
10 interest rate. They chose the amount of principal. They chose  
11 the neighborhood. Didn't they?

12 *MR. KELLY:* One would assume.

13 *THE COURT:* Yeah. In writing, we saw them do it. So,  
14 all that was required was they pay for it. They can't or  
15 won't. They lose. Anything else?

16 *MR. KELLY:* I just ask the Court to reconsider the  
17 joint and several aspects of the sanctions.

18 *THE COURT:* I have. The answer is it's joint and  
19 several. Your clients have the money. They've got 26 months  
20 of unpaid mortgage payments. That's more than enough to pay  
21 this. But you cannot run up somebody's costs and then say it's  
22 all my client's fault. It takes both of you.

23 *MR. KELLY:* Your Honor, we were pursuing what we  
24 thought were meritorious claims. That's all we were doing.

25 *THE COURT:* Your thought level is not the standard for

1 proper practice of law. You did not make your disclosures.  
2 You did not investigate the facts. You assert they're  
3 confused, but you have no fact that would justify that  
4 assertion. All you have is after the first conference, you  
5 read Olson's report. All you have is an unqualified person  
6 drafting a report that is much like internal personnel  
7 memoranda in the government, which is all blather and no  
8 substance. You can rely on tea leaves for all I care, but  
9 you'll take the consequences. This is not a game.

10 *MR. KELLY:* I didn't say it's a game.

11 *THE COURT:* Litigation is not a piñata that you get to  
12 whack at it with a stick until something falls out from the  
13 other side. You cannot do it.

14 All right. Anything else?

15 *MR. CHENAULT:* No, Your Honor.

16 *THE COURT:* All right. I'll circulate a draft of the  
17 order just to make sure the legal descriptions and everything  
18 are right.

19 *MR. KELLY:* And there will be a final judgment,  
20 correct?

21 *THE COURT:* It will be a final judgment.

22 *MR. KELLY:* Okay.

23 *MR. CHENAULT:* Thank you, Your Honor.

24 *(Concluded at 11:34 a.m.)*

25 \* \* \*

1 I certify that the foregoing is a correct transcript from the  
2 record of proceedings in the above-entitled cause, to the best  
3 of my ability.

4

5 /s/ Kathy L. Metzger  
Kathy L. Metzger  
6 Official Court Reporter

9-17-2013  
Date

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